IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. — 25

CHARLES T. HVASS,

Petitioner,

vs.

THE HONORABLE HENRY N. GRAVEN, AS JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, AND THE HONORABLE EDWIN R. HICKLIN, AS JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, BY ASSIGNMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on June 26, 1958.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, p. 9 *infra*, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a judge who, while sitting by designation and assignment in another district, has granted a motion to dismiss a criminal indictment on one of several available grounds, have jurisdiction, conferred by 28 U.S.C. § 296, to make final disposition of the motion on the other grounds urged in its support where, after expiration of the period for which he was designated and assigned to the district, this Court has reversed dismissal of the indictment on the ground originally relied on by the judge?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 292(b) and U.S.C. § 296, which provide as follows:

§ 292. District judges

* * * (b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

§ 296. Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, nothwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

STATEMENT

Petitioner was indicted for perjury in the Northern District of Iowa on March 20, 1956. The indictment charged that he had committed perjury in a hearing held in that court, respondent Judge Henry N. Graven presiding, pursuant to Local Rule 3 of that district. (R. 2). On March 21, 1956, Judge Graven ordered that "all proceedings" in the case be handled by Judge George T. Mickelson, of the District Court of South Dakota. (R. 10). Judge Mickelson had been designated and assigned to the Northern District of Iowa by the chief judge of the Eighth Circuit, in accordance with 28 U.S.C. § 292(b), for periods finally expiring January 1, 1957. (R. 35).

Subsequently petitioner moved to dismiss the indictment for failure to state facts sufficient to constitute an offense against the United States. (R. 28). In connection with this motion petitioner and the United States filed extensive briefs and furnished exhibits to the court, and lengthy argument was heard by Judge Mickelson on November 13, 1956. (R. 4). On December 20, 1956, Judge Mickelson filed a memorandum granting the motion to dismiss, and judgment was entered accordingly on December 27, 1956. (R. 11-18). Petitioner's principal contention had been that Local Rule 3, under which he was examined, was invalid, but Judge Mickelson did not pass on that question, saying:

> The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the in-

dictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury.

R. 15); *United States* v. *Hvass*, 147 F.Supp. 597 (N.D. Iowa 1956).

The United States appealed the dismissal of the indictment to this Court, under the Criminal Appeals Act, 18 U.S.C. § 3731, and this Court, holding Judge Mickelson's construction of the perjury statute to be erroneous, reversed and remanded the case to the District Court "for further proceedings not inconsistent with this opinion." *United States* v. *Hvass*, 355 U.S. 570, 578 (1958). The Court was at pains in its opinion twice to indicate that the question of the validity of Local Rule 3 was not before the Court, because of the restricted scope of appeal under the Criminal Appeals Act, and that the Court was not deciding whether or not Rule 3 is invalid for any reason. *Id.* at 574, 576.

The decision of this Court was handed down on March 3, 1958. On March 10, 1958, petitioner, after first communicating with Judge Mickelson, renewed his motion to dismiss the indictment. (R. 5). He did so by service on the United States Attorney of a motion in all respects identical to that originally made (R. 20), and a notice of motion specifying that the invalidity of Local Rule 3 would be relief on. (R. 19). The following day Judge Graven made an order reciting that respondent Judge Edwin R. Hicklin, of the Southern District of Iowa, was "the only out of district Judge who now holds a current assignment to this District," and ordering that all further proceedings in the case be handled by Judge Hicklin. (R. 21).

On March 22, 1958, the Court of Appeals granted leave to file an original civil action for writ of prohibition and mandamus against Judges Graven and Hicklin, and stayed all

proceedings in the criminal action until further order of the court. (R. 23). In the civil action a writ was sought to restrain the respondent judges from complying with the order purporting to reassign the case to Judge Hicklin, and from interfering in any way with disposition of the case by Judge Mickelson. (R. 8).

On June 26, 1958, the Court of Appeals denied the writ, ruling that the pending motion to dismiss the indictment was not a matter submitted to Judge Mickelson within the time of his assignment and designation to the Northern District of Iowa, and thus that Judge Mickelson no longer had jurisdiction to dispose of the motion.*

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* To be entitled to the writ of prohibition, petitioner had to establish not only that Judge Mickelson has jurisdiction of the motion, but also that if he has such jurisdiction, Judge Graven lacks power to assign the case to another judge, and that the case is a proper one for issuance of an extraordinary writ. Petitioner expressly conceded below that if Judge Mickelson no longer had jurisdiction, Judge Graven's order resassigning the case was proper, and no writ should issue. The Court of Appeals, having resolved the issue of Judge Mickelson's jurisdiction adversely to petitioner, naturally ruled against him on the other issues. Thus, for example, the Court of Appeals held that it was proper for Judge Graven to assign the case to Judge Hicklin because this order merely "assigned it to the only judge aside from himself, who then had power to exercise the jurisdiction of the court." (P. 14 *infra*). These other issues do not merit review in this Court, at least on the present record. Thus if this Court should grant certiorari and hold that Judge Mickelson has jurisdiction, the case should be remanded to the Court of Appeals to consider the other issues in the light of such a holding.

REASONS FOR GRANTING THE WRIT

1. The proper construction of 28 U.S.C. § 296, defining the powers of judges sitting by designation and assignment, is a question of great importance to the administration of the federal courts. In order to permit the fullest and most efficient use of judicial manpower, Congress has provided, in Chapter 13 of the Judicial Code, 28 U.S.C. §§ 291-296, a variety of procedures by which judges of one court may be assigned to sit for a time in another court, and the services of retired judges may be utilized. These provisions are frequently used. In 1957 there were 11 assignments of circuit judges to sit in other circuits, and 26 assignments of district judges to sit outside their circuit. *Annual Report of the Director of the Administrative Office of the United States Courts, 1957*, p. 123.

Statistics are not available as to the number of assignments of district judges to sit in other districts within their circuit, or of circuit judges to hold district court, or of retired judges or justices to active duty, but it is plain that these must be very numerous. The statute involved in the present case, 28 U.S.C. § 296, applies to all these situations and defines the powers of any judge sitting in a court other than that to which he is actively commissioned. The vauable procedures for designation and assignment of judges cannot be used to their fullest potential so long as the powers of such judges are not clearly defined, or are left to varying interpretations among the circuits.

2. The decision below is contrary to the plain language of the statute. The statute expressly authorizes the judge sitting by assignment to make "decision and final disposition" of all matters submitted to him during the period for which he was assigned, and to dispose of "further proceedings in such matters." 28 U.S.C. § 296. Petitioner's motion to dismiss in 1956 challenged the sufficiency of the indictment to state an offense against the United States, and, more specifically, the validity of Local Rule 3. These are precisely the issues

now pending in the Northern District of Iowa. Until they are resolved, there will not have been any "decision and final disposition" of the matters submitted to Judge Mickelson in 1956. This Court, reversing Judge Mickelson's order of dismissal, remanded for "further proceedings not inconsistent with this opinion"; the statute entrusts such "further proceedings" to the visiting judge who has already once heard the matter. The case is quite unlike *Frad v. Kelly*, 302 U.S. 312 (1937), for there the application for termination of probation presented to the visiting judge who had presided at the trial raised legal issues never considered by the visiting judge, and turned on facts which had occurred after the assignment of the visiting judge had expired, while in the present case the motion raises an issue which has been before Judge Mickelson once and which he might have decided at that time.

3. The decision below is inconsistent with decisions of the Fourth and Seventh Circuits. The Fourth Circuit case arose out of a judgment for claimants ordered by a visiting judge in a suit under the Tort Claims Act. The Court of Appeals, thinking the Act inapplicable, reversed, but was in turn reversed by this Court, which held the Act applicable but remanded the case to the Court of Appeals to determine whether disability benefits and medical payments which the claimants had received or would receive from the government should be deducted from their recovery under the Act. On remand, the Fourth Circuit held that such deductions should be made, and remanded the case to the visiting judge, though his assignment had purportedly expired, to make findings as to the value of such payments and to enter judgment accordingly. *United States* v. *Brooks*, 176 F.2d 482 (4th Cir. 1949). Chief Judge Parker, speaking for the court, stated that such a remand to the visiting judge would "avoid unnecessary delay and duplication of effort," and that it was authorized by 28 U.S.C. § 296. *Id.* at 484.

In the Seventh Circuit case, two persons indicted for perjury were arraigned before a visiting judge on July 9th

and pleaded not guilty. The judge's assignment to the district purportedly expired on July 16th, but in October he returned to the district and presided over the trial of the defendants. On appeal from their conviction defendants contended that the visiting judge's assignment had expired, and that he had no jurisdiction to conduct the trial. The appellate court rejected this contention in a reasoned opinion, saying that the issue of guilt or innocence framed by the defendants' pleas of not guilty remained unfinished business, properly within the jurisdiction of the visiting judge, until it was finally determined by verdict and sentence. *United States* v. *Marachowsky*, 213 F.2d 235, 243-244 (7th Cir. 1954), cert. denied 348 U.S. 826 (1954). Similarly in the present case petitioner's motion to dismiss the indictment raised an issue of law as to the sufficiency of the indictment which has not yet been resolved and which is therefore within the jurisdiction of Judge Mickelson.

Also in point is *Sunrise Mayonnaise, Inc.*, v. *Swift & Co.*, 88 F.Supp. 187 (E.D.Pa. 1949), where the regular judge of a district held that he lacked jurisdiction to hear reargument of a motion which had been presented to a visiting judge, since "the particular motion which this court is asked to rule upon was in controversy and was subject to a ruling by the visiting judge at the time of his departure."

The facts in these cases are sufficiently different from those in the present case that it may be that the decisions are not technically conflicting. But it is apparent that the construction placed on 28 U.S.C. § 296 by the Eighth Circuit in the present case is far more restrictive than that of the other courts whose decisions are here noted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

GARDNER, Chief Judge.

This is an original proceeding brought by petitioner Charles T. Hvass seeking writ of prohibition and mandamus against respondents, the Honorable Henry N. Graven, as Judge of the United States District Court for the Northern District of Iowa, and the Honorable Edwin R. Hicklin, as Judge of the United States District Court for the Northern District of Iowa, by assignment.

Petitioner Hvass was on March 20, 1956, indicted in the Northern District of Iowa for perjury allegedly committed in a proceeding before Judge Graven. Thereafter, on March 21, 1956, Judge Graven entered an order assigning the case for trial to the Honorable George T. Mickelson, United States District Judge for the District of South Dakota, then

sitting in the Northern District of Iowa by assignment. Without arraignment petitioner filed a motion to dismiss the indictment on the ground that it failed to state facts sufficien to constitute an offense against the United States. On hearing of this motion Judge Mickelson sustained same and entered an order dismissing the indictment. From this order the United States perfected a direct appeal to the United States Supreme Court and in due course, on the 3rd day of March, 1958, the Supreme Court reversed the order and remanded the case to the United States District Court for the Northern District of Iowa for further proceedings. In the meantime and on January 1, 1957, Judge Mickelson's assignment to the Northern District of Iowa expired and respondent Judge Hicklin was duly assigned to the Northern District of Iowa on the 1st day of September, 1957, for a period expiring the 1st day of September, 1959. On March 11, 1958, petitioner, still without arraignment, filed a new motion to dismiss the indictment. Thereupon Judge Graven entered the following order:

> "On March 20th, 1956, when the Indictment was returned in this case the then United States District Judge for the Southern District of Iowa was disabled. He died in December, 1956. Since August, 1957, the Honorable Edwin R. Hicklin has been the United States District Judge for the Southern District of Iowa. He is the only out of district judge who now holds a current assignment to this District.
>
> IT IS, THEREFORE, ORDERED that all further proceedings in the above-entitled case will be handled by the Honorable Edwin R. Hicklin, United States District Judge for the Southern District of Iowa, with whom counsel in the case will take up all matters directly which relate to the case."

Following the entry of this order and before any proceedings had been had before Judge Hicklin, the present proceeding was commenced, seeking writ of prohibition and mandamus against respondents restraining, prohibiting and

preventing them from making, entering or enforcing, or in any manner complying with said order reassigning the case, and restraining, prohibiting and preventing them from in any manner interfering with, directly or indirectly, any further proceedings in said action or the disposition thereof by Judge Mickelson.

In this proceeding petitioner challenges the validity of the order designating Judge Hicklin to try the case on substantially the following grounds: (1) the case of *United States* v. *Hvass* is properly pending before Judge Mickelson, (2) Judge Graven lacks jurisdiction to reassign a pending case, and (3) issuance of an extraordinary writ in these circumstances is appropriate.

Judge Mickelson was designated and assigned to the Northern District of Iowa for periods finally expiring January 1, 1957. The designation was a general one * * * to hold or assist in holding the District Court of the United States in and for the several divisions of the Northern District of Iowa * * * in place or in aid of the Honorable Henry N. Graven, United States District Judge for the said Northern District of Iowa." The designation was made pursuant to statutory authority providing that:

> "The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." Section 292(b), Title 28, U.S.C.A.

The powers that may be exercised by a district judge so designated and assigned are prescribed by statute. Section 296, Title 28, U.S.C.A. The statute, after providing that a designated and assigned judge shall have all powers of a judge of the court to which he is designated and assigned, provides that:

> "A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit

or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

As herein recited, immediately following petitioner's indictment Judge Graven referred the case to Judge Mickelson who was then acting under assignment to the Northern District of Iowa. Petitioner then presented to Judge Mickelson a motion to dismiss the indictment. That motion was sustained and Judge Mickelson entered an order on the only matter submitted to him, and so far as he was concerned the case was terminated by an order of dismissal. Petitioner had not been arraigned and the question of his guilt or innocense had not been made an issue by the entrance of any plea. The assignment and designation of Judge Mickelson specifically provided that, "This assignment shall extend to cover disposition of any matters submitted during the above period of assignment." At the expiration of the period of his assignment there were no undisposed of matters which had been submitted to him during his period of assignment. The extent and limitations of the power of an assigned district judge are well defined by the United States Supreme Court in *Frad* v. *Kelly*, 302 U.S. 312, as follows:

"When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district. But the Act goes no further.

It clearly does not contemplate that he shall decide any matter which has not been submitted to him within the designated district." (Emphasis supplied.)

The power reserved which may be exercised after the expiration of an assignment is illustrated by the decisions in *Clarke* v. *Chicago, B. & Q. R. Co.*, 10 Cir., 62 F.2d 440 and *United States* v. *Goldstein*, 8 Cir., 271 F. 838. In the instant case the motion filed by petitioner does not seek a rehearing on his prior decision, nor does he seek any further action on that motion, but he appropriately files a *new* motion recognizing that final action had theretofore been taken on his first motion. We do not think the pending motion can be said, within the purview of the statute, to present for consideration a matter submitted to Judge Mickelson within the time of his assignment and designation to the Northern District of Iowa. The decisions in *Sunrise Mayonnaise, Inc.* v. *Swift & Co.*, E.D.Pa., 88 F. Supp. 187; *United States* v. *Brooks*, 4 Cir., 176 F.2d 482; *United States* v. *Garsson*, S.D. N.Y., 291 F. 646 and *United States* v. *Marachowsky*, 7 Cir., 213 F.2d 235, relied upon by petitioner on this point, are readily distinguishable on their facts, and analysis of them would unduly lengthen this opinion and serve no useful purpose.

But it is contended that Judge Graven was without jurisdiction to reassign this case to Judge Hicklin. There is no doubt that Judge Graven was the Chief Judge of the Northern District of Iowa and as such had power to exercise whatever jurisdiction was vested in that court. Sections 136 and 137, Title 28 U.S.C.A. The effect of petitioner's contention is that this case, having once been referred to Judge Mickelson while he had power to exercise the jurisdiction of the United States District Court for the Northern District of Iowa, vested in him exclusive power to hear and determine the case. The statute is permissive in form and provides that an assigned judge, after the expiration of his assignment "*may*" act, etc. There may well be cases in which a failure of the assigned judge to act in matters submitted to him

during the time of his assignment would result in a miscarriage of justice, in which event it would be an abuse of discretion on the part of the assigned judge not to act, and there might well be circumstances under which it would be an abuse of discretion on the part of the Chief Judge not to refer the decision in such matters to the assigned judge, but there are no such circumstances apparent in the present case. Carried to its logical conclusion petitioner's contention would prevent any case once assigned to a district judge for decision and trial thereafter to be assigned to another district judge. The prevailing practice of the district judges in this circuit at least is to the contrary. See *Wisniewski* v. *United States*, 8 Cir., 247 F.2d 292; *Segal* v. *United States*, 8 Cir., 246 F.2d 814; *American Surety Co.* v. *Schottenbauer*, 8 Cir., . . . F.2d . . . . In each of these cases there were two trials, each being had before a different judge.

Jurisdiction to try petitioner's case is vested in the United States District Court for the Northern District of Iowa and it remains there notwithstanding the fact that Judge Mickelson, while assigned to the Northern District of Iowa, had power to exercise that jurisdiction. He did not, at the expiration of his period of assignment, retain or take with him out of the district the power to exercise that jurisdiction except as to matters submitted to him while he was so assigned.

It is argued that Judge Graven did not have authority to revoke the old order by which he assigned the case to Judge Mickelson for hearing. The short answer to this contention is that he did not revoke his old order nor withdraw the case from Judge Mickelson and assign it to Judge Hicklin. He merely in due course as an administrative act routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court. This is made abundantly clear by Judge Graven's memorandum opinion wherein it is said:

"It is the further view of the Court under the type of assignment referred to that the Judge of the District

> retains control of the docket of his District and the assignment of cases, subject only to the limitations that matters presently under consideration by the outside Judge should await his consideration and that reviews of his rulings and holdings should not be had.

Manifestly, the order here assailed did not affect litigation before another judge, as was the case in *United States* v. *Heath*, Hawaii, 103 F.Supp. 1, relied on by petitioner. There is no suggestion that Judge Hicklin is disqualified nor is there any doubt that he has the power to exercise, under his assignment to the Northern District of Iowa, the jurisdiction of that court, and a litigant has no vested right to have his case tried before any particular judge. In *Levine* v. *United States*, 8 Cir., 182 F.2d 556, we said:

> "But even if control over the assignment of cases were not observed by the court under the rule, the judges have inherent power to administer the business of the courts in an orderly way. Litigants have no vested right in the order in which cases are assigned for trial, and it is not contended that the judge to whom the case was assigned was in any way disqualified."

The issuance of the extraordinary writs sought in this proceeding should be confined to cases where the petitioner has an unquestioned legal right to have the performance of the particular duties sought to be enforced or enjoined. They will not be issued as a matter of right. As said by the United States Supreme Court in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

The case of *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, may be said to have liberalized the rule somewhat to the extent that the writs may issue in exceptional cases where

there has been a flagrant abuse of discretion by a trial judge. In *Great Northern Railway Company* v. *Hyde*, 8 Cir., 245 F.2d 537, in discussing the *La Buy* case we pointed out that:

> "The *La Buy* case, as the Supreme Court took pains to point out, presented an extreme situation of a District Judge abusing judicial power which amounted to little less than an abdiction of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

It is only in the exceptional case that the appellate court will exercise its descretion to issue such writs and we have consistently held that this discretion should be sparingly exercised. *Sound Investment & Realty Co.* v. *Harper*, 8 Cir., 178 F.2d 274; *Hydraulic Press Mfg. Co.* v. *Moore*, 8 Cir., 185 F.2d 800; *Leimer* v. *Reeves*, 8 Cir., 184 F.2d 441; *Wabash R. Co.* v. *Duncan*, 8 Cir., 170 F.2d 38. In *Sound Investment & Realty Co.* v. *Harper*, supra, we said:

> "The application is addressed to the sound judicial discretion of the court but is subject to rules of procedure governing such matters. Before the court will issue the writ it must be made to appear that the petitioner has an unquestioned legal right to have the performance of the particular duties sought to be enforced. It must also appear that petitioner has no other plain, adequate and complete method of obtaining the relief to which he is ultimately entitled. In other words, it must appear that without the issuance of the writ there will be a miscarriage of justice."

In the *Harper* case we also said:

> "The writ, however, may not be invoked as a substitute for appeal and it will not lie as a general rule where there is a remedy by appeal even in cases where such an appeal may involve inconvenience, delay or expense to the petitioner."

We do not think there are any such exceptional circumstances in this case as to require this court to exercise its

discretion. On the contrary, we think the facts rather clearly demonstrate that there is no basis for invoking the power of this court to grant the relief applied for in this proceeding.

For all the foregoing reasons the petition will be denied.

JUDGMENT BELOW

This matter came on to be heard on Petition for a Writ of Prohibition and Mandamus against the Respondents, the Honorable Henry N. Graven, as Judge of the United States District Court for the Northern District of Iowa, and the Honorable Edwin R. Hicklin, as Judge of the United States District Court for the Northern District of Iowa, by Assignment, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the said Petition for Writ of Prohibition and Mandamus in this matter be, and it is hereby denied.

June 26, 1958